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G.T., Appellant)	
)	
and)	Docket No. 20-1639
)	Issued: April 7, 2021
DEPARTMENT OF THE NAVY, MILITARY)	
SEALIFT COMMAND, Norfolk, VA, Employer)	
)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

¹ The Board notes that, during the pendency of this appeal, OWCP issued a November 20, 2020 decision, which denied reconsideration of the merits of the claim. The Board and OWCP may not simultaneously exercise jurisdiction over the same issues. 20 C.F.R. § 501.2(c)(3). Following the docketing of an appeal before the Board, OWCP does not retain jurisdiction to render a further decision regarding the issue(s) on appeal until after the Board relinquishes jurisdiction. *Id.* Consequently, as the Board exercised jurisdiction on September 14, 2020, OWCP's November 20, 2020 decision is set aside as null and void. *See also* 20 C.F.R. § 10.626; *see also J.W.*, Docket No. 19-1688, n.1 (issued March 18, 2020); *J.A.*, Docket No. 19-0981, n.2 (issued December 30, 2019); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has been previously before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 8, 2018 appellant, then a 54-year-old assistant storekeeper, filed a traumatic injury claim (Form CA-1) alleging that on November 2, 2017 she injured her right arm and lower back when "getting a shot and pulling boxes" while in the performance of duty. She indicated that her injury occurred while she was onboard the United States Naval Ship (USNS) Matthew Perry. Appellant did not stop work.

In an August 8, 2018 attending physician's report (Form CA-20), Darla Clift, a physician assistant, observed that, in November 2017, appellant received an anthrax shot that caused her right arm pain. Appellant also complained of back pain caused by lifting and pulling boxes. Ms. Clift diagnosed right arm and low back pain and checked a box marked "No" to indicate her opinion that appellant's condition was not caused or aggravated by her federal employment.

By development letter dated August 21, 2018, OWCP advised appellant of the factual and medical deficiencies of her claim. It requested that she complete a questionnaire to provide further details regarding the alleged November 2, 2017 employment incident and requested a narrative medical report from her treating physician, which contained a detailed description of findings and diagnoses, explaining how the alleged employment incident caused, contributed to, or aggravated her medical conditions. OWCP afforded appellant 30 days to respond.

In a November 7, 2017 report, appellant informed Wayne Pocza, a medical service officer, that she experienced back pain after over exerting herself two days prior while moving boxes and lifting valves multiple times. Mr. Pocza diagnosed a low back strain and released her to work full duty.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the December 6, 2019 decision, OWCP received additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁴ Docket No. 19-1307 (issued December 6, 2019).

In an August 8, 2018 report, Ms. Clift reevaluated appellant for lower back pain she had experienced since November 2017. On reevaluation she diagnosed back pain and right arm pain. Ms. Clift explained that, without injury or trauma, it was hard to imagine that appellant's back pain had been going on for 9 months and her right arm had been going on for 10 months due to an anthrax shot. She disagreed with appellant's pain level and felt that she could perform her job duties. In a duty status report (Form CA-17) of even date, Ms. Clift diagnosed a sore back and sore right arm and provided work restrictions for appellant to follow.

In an August 8, 2018 diagnostic report, Dr. Sanjay Patel, a Board-certified radiologist, performed an x-ray scan of appellant's lumbosacral spine, finding mild degenerative changes of the lumbar spine.

In an August 22, 2018 medical summary form, Ms. Clift recounted appellant's history of right arm pain after an anthrax shot 10 months prior and low back pain from lifting boxes 9 months prior. She noted no findings on examination except for appellant's subjective complaints and diagnosed right arm pain and a low back strain.⁵ Ms. Clift referred appellant to an orthopedist.

In a September 4, 2018 medical report, Dr. Michael Webb, Board-certified in occupational medicine, evaluated appellant for her chronic lumbar pain that began in October or November 2017. On evaluation he diagnosed chronic lumbar pain and advised that she work modified duty and continue her physical therapy. Dr. Webb referred appellant for an orthopedic evaluation. In a Form CA-17 of even date, he diagnosed a lumbosacral sprain and suggested work restrictions.

In response to OWCP's questionnaire, appellant submitted a September 6, 2018 statement, wherein she explained that on the day of the incident she was moving six boxes that weighed approximately 15 pounds when she injured her back. She provided that she was unable to twist or turn her back as a result and that she had no prior injuries before the alleged employment incident.

By decision dated September 25, 2018, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish that her diagnosed condition was caused or aggravated by the accepted November 2, 2017 employment incident.

OWCP continued to receive evidence. In an October 1, 2018 medical report, appellant informed Dr. Webb that she was still experiencing pain in her lower back and muscle spasms in the lumbar area. Dr. Webb diagnosed chronic lumbar pain and released appellant to modified duty.

On October 22, 2018 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

In an October 1, 2018 medical summary form, Dr. Webb diagnosed an acute lumbar strain and checked a box to indicate his opinion that appellant was not fit for duty pending an orthopedic evaluation.

⁵ Ms. Clift opined that appellant had significantly magnified her symptoms in relation to her low back strain diagnosis.

By decision dated February 22, 2019, an OWCP hearing representative affirmed, as modified, the September 25, 2018 decision, finding that the evidence of record was insufficient to establish the factual component of fact of injury.

By letter dated February 28, 2019, appellant requested reconsideration of OWCP's February 22, 2019 decision.

In a December 5, 2018 diagnostic report, Dr. Shapour Bahadori, a Board-certified radiologist, performed a magnetic resonance imaging (MRI) scan of appellant's lumbar spine, finding mild multilevel degenerative changes and no high-grade canal or neural foraminal stenosis.

In a December 12, 2018 medical report, Dr. David Clifford, a Board-certified orthopedic surgeon, evaluated appellant for her lumbar pain and diagnosed "5-1 degenerative disc disease" and low back pain.

In a December 19, 2018 medical summary form, Dr. David Clifford, a Board-certified orthopedic surgeon, diagnosed lumbar pain/strain and noted appellant's history of lifting boxes. He indicated that she was not fit for duty at that time.

By decision dated May 7, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim.

On May 24, 2019 appellant appealed to the Board. By decision dated December 6, 2019, the Board affirmed OWCP's May 7, 2019 decision, finding that she had not met her burden of proof to establish an injury in the performance of duty on November 2, 2017 and that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

OWCP continued to receive evidence. Appellant submitted a June 14, 2019 notice of proposed removal in which the employing establishment proposed to remove her from her position, finding that she was permanently not fit for sea duty.

On March 9, 2020 appellant requested reconsideration.

By decision dated March 25, 2020, OWCP denied appellant's request for reconsideration.

On August 25, 2020 appellant requested reconsideration of OWCP's March 25, 2020 decision and attached a copy of the June 14, 2019 notice of proposed removal.

By decision dated September 2, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁶

To require OWCP to reopen a case for merit review, pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁹ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁰

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Appellant did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that appellant is not entitled to a review of the merits based on either the first or second requirement under 20 C.F.R. § 10.606(b)(3).¹¹

The Board further finds that appellant did not fulfill the third requirement under 20 C.F.R. § 10.606(b)(3) because she did not submit relevant and pertinent new evidence not previously considered by OWCP. The issue on appeal is whether appellant has met her burden of proof to establish that she sustained an injury/condition in the performance of duty on November 2, 2017,

⁶ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁷ 20 C.F.R. § 10.606(b)(3); *see L.D.*, *id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁸ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of the merit decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁹ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹⁰ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹¹ *Supra* note 8.

as alleged. In support of her request she submitted a copy of the June 14, 2019 notice of proposed removal. The Board finds that submission of this evidence does not require reopening appellant's case for merit review, as it had already been considered by OWCP. Providing evidence that either repeats or duplicates information already in the record does not constitute a basis for reopening a claim.¹² For this reason, appellant has also failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹³

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the September 2, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 7, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹² See *P.W.*, Docket No. 20-0380 (issued November 23, 2020); *C.L.*, Docket No. 20-0410 (issued October 29, 2020); *S.F.*, Docket No. 18-0516 (issued February 21, 2020); *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

¹³ See *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *A.R.*, Docket No. 16-1416 (issued April 10, 2017); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).